No. 91-535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether Hawaii's blanket prohibition against write-in voting in all elections unreasonably and unjustifiably denies its citizens the right to express their support for individuals of their own choosing and to participate fully and freely in the electoral process, as guaranteed by the United States Constitution.

PARTIES

The caption of the case contains the names of all parties.

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OPINIONS BELOW

The June 28, 1991 opinion of the United States Court of Appeals for the Ninth Circuit is reported at 937 F.2d 415 (9th Cir. 1991), and is set forth in the Appendix to the Petition for a Writ of *Certiorari* at 1a-17a. The March 1, 1991 opinion of the Ninth Circuit which was withdrawn and superseded by the June 28, 1991 opinion is reported at 927 F.2d 469 (9th Cir. 1991), and is set forth in the Appendix to the Petition at 18a-31a.

The opinion and order of the United States District Court for the District of Hawaii, dated May 10, 1990, granting plaintiff's motion for summary judgment and permanent injunctive relief is reported at 737 F.Supp. 582 (D.Haw. 1990), and is set forth in the Appendix to the Petition at 32a-51a.

The opinion of the Hawaii Supreme Court, dated July 21, 1989, in response to certified questions from the United States District Court is reported at 776 P.2d 824 (1989), and is set forth in the Appendix to the Petition at 52a-55a.

The July 19, 1988 order certifying questions of Hawaii law to the Supreme Court of Hawaii is unreported. It is set forth in the Appendix to the Petition at 56a-57a. The August 9, 1988 Amended Certification from the United States District Court for the District of Hawaii to the Hawaii Supreme Court is set forth in the Appendix to the Petition at 58a-60a. The May 17, 1988 decision of the United States Court of Appeals for the Ninth Circuit is reported at 846 F.2d 587 (9th Cir. 1988), and is set forth in the Appendix to the Petition at 61a-66a. The decision, order and opinion of the district court, dated September 29, 1986, granting plaintiff's motion for summary judgment and injunctive relief is unreported. It is set forth in the Appendix to the Petition at 67a-77a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered an opinion and judgment in this case on March 1, 1991. Pursuant to F.R. App. P. Rule 40, Burdick's time to file a petition for rehearing with a suggestion of rehearing *en banc* was enlarged from 14 to 21 days by order of the Ninth Circuit, dated April 15, 1991 (*See* discussion of this matter in Petitioner's Reply To Brief in Opposition at 3-5). Burdick's petition for rehearing with a suggestion for rehearing *en banc* was filed

on March 18, 1991, in compliance with the court of appeals' order of April 15, 1991 and was, therefore, timely filed. On June 28, 1991, the court of appeals withdrew its March 1, 1991 opinion; denied the petition for rehearing; rejected the suggestion for rehearing *en banc*; and entered a new opinion and judgment. A timely petition for a writ of *certiorari* from the June 28, 1991 opinion and judgment of the United States Court of Appeals for the Ninth Circuit was served and filed on September 25, 1991, pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, as well as Hawaii Revised Statutes §§12-1, 12-2, 12-41, 16-1, 16-22, and 16-26, are set forth in the Appendix to the Petition for a Writ of *Certiorari* at 78a-81a.

STATEMENT OF THE CASE

This case involves the most basic of all constitutional rights -- the right of citizens to vote for the individuals of their choice. Hawaii state officials have interpreted the Hawaii election laws to prohibit citizens from submitting write-in ballots in primary and general elections held for local, state and federal offices. In so doing, Hawaii officials deprive citizens of the right to express their dissatisfaction with the range of choices presented on the ballot and to vote, instead, for individuals of their own personal preference. Moreover, Hawaii's policy effectively compels citizens to express support for candidates with whom they might disagree or suffer the penalty of not voting at all. At issue in this case is whether Hawaii's total ban on write-in voting can withstand the serious judicial scrutiny required by the federal Constitution.

Statement of Facts

Petitioner Alan B. Burdick is a resident and registered voter in the City and County of Honolulu, Hawaii. In recent years, petitioner frequently found himself dissatisfied with the choice of candidates appearing on the ballot. All too often he found that, with respect to some electoral contests, none of the candidates listed on the ballot represented his views or shared his positions on significant public policy matters. He regarded his exercise of the franchise as a civic responsibility. But he found unacceptable the prospect that, in the discharge of this civic responsibility, he should be compelled to choose only among the candidates listed on the ballot or not vote at all. Instead, he regarded write-in voting as an appropriate mechanism by which he could exercise his fundamental right to vote without being compelled to express support for candidates with whom and policy positions with which he disagreed. (J.A.31-33, 38-39, 40-46).[1]

Accordingly, in June 1986, petitioner wrote to Hawaii officials inquiring into the state's write-in voting policy. Hawaii officials responded to petitioner's inquiry by informing him that Hawaii law does not explicitly provide for write-in voting and that were he to try to execute a write-in ballot it would not be counted. Subsequently, Hawaii election officials provided Burdick with a copy of an opinion letter, dated July 11, 1986, issued by the Hawaii Attorney General's Office. This opinion letter rested upon the premise that the Hawaii election law contained no provision requiring that write-in voting be permitted. The letter went on to conclude that neither the legislature nor Hawaii election officials were required, as a matter of constitutional principle, to permit write-in voting. (J.A.36).

Burdick was especially concerned about this interpretation of Hawaii law because, during the 1986 electoral season, the State House of Representatives election held in the district in which Burdick lived featured only one candidate, running unopposed. Burdick had no interest in voting for that candidate. He did, however, wish to exercise his franchise by casting a write-in ballot expressing his opposition to the single choice on the state-prepared ballot. Having already been told that write-in voting was impermissible under Hawaii law, Burdick brought this lawsuit challenging Hawaii's refusal to permit his expression of political dissent at the polling booth. (J.A.32).

[1] Citations preceded by the letters J.A. refer to the Joint Appendix. Citations preceded by Pet.App. refer to the appendix to the petition for *certiorari*. Citations preceded by Op.Cert.App. refer to the appendix to respondents' brief in opposition to the petition for *certiorari*.

Proceedings Below

Petitioner filed suit in August, 1986 in the United States District Court of Hawaii. The suit alleged that the denial of petitioner's right to cast a write-in ballot for the person or persons of his choice violated, *inter alia*, the First and Fourteenth Amendments to the federal Constitution and that it violated, as well, the Hawaii Constitution.

The district court held that Hawaii's refusal to permit write-in voting constituted a violation of petitioner's freedom of expression and right of political association. Accordingly, the district court issued injunctive relief directing Hawaii to provide for the casting and counting of write-in votes in the November, 1986 elections. (Pet. App. 67a-78a). The state moved, in the district court, for a stay of the injunction pending appeal and the motion was denied.

An appeal was taken to the Court of Appeals for the Ninth Circuit which stayed the injunction pending dispo-

sition of the appeal. On May 17, 1988,[2] the Ninth Circuit reversed and directed the district court to abstain -- under the *Pullman* abstention doctrine -- from reaching the federal constitutional questions on the ground that the case raised outstanding questions of state law that needed to be resolved prior to any federal constitutional adjudication of this controversy. (Pet.App. 61a).

On remand, the district court certified three questions to the Hawaii Supreme Court. (Pet.App. 56a-57a, 58a-60a). The questions, seeking interpretations of state law and of the state constitution exclusively,[3] were as follows:

> (1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
>
> (2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
>
> (3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

In an opinion issued on July 21, 1989, the Hawaii Supreme Court answered each of the certified questions in the negative, concluding that Hawaii law prohibited write-in voting and that such a prohibition was entirely consistent with the Hawaii Constitution. (Pet.App. 52a-55a).

Burdick thereupon renewed his motion for summary judgment in the federal district court. On May 10, 1990, the district court again declared that Hawaii's prohibition against write-in voting violated the federal constitution. And, again the district Court granted petitioner's motion for summary judgment and injunctive relief.[4] Unlike the previous occasion, however, in this instance, the district court stayed its mandate pending appeal. (Pet.App. 32a-51a).

On appeal for a second time, the Ninth Circuit reached the merits and reversed the judgment of the district court in an opinion issued March 1, 1991. (Pet. App. 18a-31a). Burdick petitioned for rehearing with a suggestion of rehearing *en banc*. On June 28, 1991, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing *en banc*. At the same time, the court of appeals withdrew its March 1, 1991 opinion and issued a new opinion which again reversed

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[2] Fearing that the Ninth Circuit might not decide the appeal prior to the September, 1988 primary election, Burdick filed a second suit entitled, *Burdick v. Cayetano*, Civil No. 88-0365, seeking relief in connection with the then forthcoming 1988 elections. Burdick filed the second suit on May 17, 1988 unaware that, on that same day, the Ninth Circuit had decided the appeal in the first suit. The two actions were later consolidated at the district court and on appeal. (J.A.142, 211).

[3] Contrary to the arguments subsequently advanced by the State of Hawaii in the Ninth Circuit and in opposing certiorari review by this Court, the certified questions presented to the Hawaii Supreme Court involved only questions of state law. As can be plainly seen from the text of the questions certified by the federal District Court to the Hawaii Supreme Court, no issues involving federal law were presented to the Hawaii Supreme Court.

[4] The district court's initial order included a permanent injunction, the terms of which were not specified, and a preliminary injunction directing state officials to count, record and tabulate all write-in votes in connection with the November 1986 election. (Pet.App. 77a). In its second opinion, the district court held Hawaii's policy unconstitutional and granted "plaintiff's motion for summary judgment and for permanent injunctive relief," (Pet.App. 51a) without specifying the terms of the injunction. The Ninth Circuit's reference to a "preliminary injunction" (Pet.App. 7a) is, therefore, incorrect.

the district court's decision granting Burdick's motion for summary judgment and injunctive relief. (Pet.App. 1a-17a). A petition for a writ of *certiorari* was timely served and filed in this Court on September 25, 1991.

The Opinion Below

In reversing the district court's decision, the Ninth Circuit adopted a narrow conception of the constitutional right of electoral participation and concluded that Hawaii's restriction on write-in voting did not impose a "substantial burden" either on Burdick's right to vote or on his right of political expression. (Pet.App. 11a). On the basis of this conclusion, the court engaged in only a casual review of the state's proffered justifications for its policy. The Ninth Circuit found that the prohibition against write-in voting served three interests: an interest in "political stability;" an interest in "an informed electorate;" and an interest in permitting candidates for certain elected offices, who emerge from the primary election without opposition, to take office without running in the general elections. But, the court of appeals never asked whether Hawaii's total ban against write-in voting was "necessary" or "narrowly tailored" to the pursuit of these interests.

In reaching its conclusions, the Ninth Circuit recognized that its decision was inconsistent with the conception of the franchise adopted by the Fourth Circuit in *Dixon v. Maryland State Admin. Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989). (Pet.App. 14a). The decision of the Ninth Circuit also allowed Hawaii to remain out of step with most other jurisdictions in this country that permit write-in voting, at least in general elections.[5] It

[5] According to a 1990 Harvard Law Review note three states, in addition to Hawaii, impose a complete ban on write-in voting. Those three states are Nevada, Nev. Rev. Stat. §24-293.270(2)(1987); Okla-
(continued...)

was at odds with the constitutionally based decisions of the highest courts in many of those jurisdictions. Indeed, there has developed a deep and longstanding tradition among state courts requiring that write-in voting be made available.[6] And, prior to the Ninth Circuit decision in this case, a smaller body of federal court rulings had also pointed decidedly in favor of a constitutionally protected right to cast a write-in ballot. The decision of the Ninth Circuit was at odds with these decisions, as well.[7]

[5] (...continued)
homa, Okla. Stat. Tit. 26 §7-127(I)(Supp. 1989); and South Dakota, S.D. Codified Laws Ann. §12-16-1 (1982 & Supp. 1990). Recent Development, "First Amendment -- Voters' Speech Rights -- Federal District Courts Mandate Availability of Write-In Voting," 104 Harv.L. Rev. 657, 662 n.44 (1990)(hereinafter cited as "Voters' Speech Rights").

The note further identified eight states that permit write-in voting in general elections but prohibit such voting in primary elections. *Id.* at 662 n.45. And the note identified "[a]t least 16 states [that] require some form of pre-registration by write-in candidates." *See id.* at 663 n.47. The remaining states apparently permit write-in voting in primary as well as general elections without significant limitation.

[6] A few of these state courts -- most notably the Supreme Court of California in *Canaan v. Abdelnour*, 710 P.2d 268 (Cal. 1985) -- have held that the right to cast a write-in ballot is protected by both the federal and state constitutions. A larger number of state courts have relied exclusively on their own state constitutions in upholding write-in voting. But, as the California Supreme Court also noted in *Canaan*, other "courts have construed statutes which were silent on the issue to allow write-in voting to avoid constitutional difficulties" and still others "have expressed in dicta that voters have the constitutional right to write-in the candidates of their choice." *Id.* at 282 n.22. The range of state court decisions is collected in *Canaan*. *Id.*

While the weight of state court authority strongly favors write-in voting, the case-law is not unanimous with respect to this matter. For a list of contrary cases, *see* Batey, "Electoral Graffiti: The Right to Write-in," 5 Nova L.J. 201, 206 n.31 (1981).

[7] In addition to *Dixon*, federal courts conferred constitutional protec-
(continued...)

Finally, but most importantly, the Ninth Circuit decision resting, as it did, upon a constricted vision of the constitutional interests at stake in this case, misapplied this Court's jurisprudence respecting rights of political participation and expression. These matters will be amplified in the Argument set forth below.

SUMMARY OF ARGUMENT

At the very core of our constitutional system is an abiding commitment to representative democracy. And the essence of representative democracy is its insistence that "each and every citizen has an inalienable right to full and effective participation in the political processes . . . ." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Each individual has the right to direct his or her "portion of sovereign power" to the ultimate end of advancing those governmental outcomes that he or she chooses to sponsor. *Board of Estimate v. Morris*, 489 U.S. 688, 693 (1989)(quoting *Luther v. Borden*, 7 How. 1, 30 (1849) (statement of counsel, Daniel Webster)).

Voting is the critical act of political participation in a democracy. By lending or refusing to lend the support of their votes to candidates, members of a political community affect democratic outcomes in a variety of ways. Obviously, each voter gives or withholds one vote from the candidate in question and thus incrementally increases or decreases the likelihood that the candidate

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[7] (...continued)
tion on write-in ballots in *Paul v. Indiana Election Bd.*, 743 F.Supp. 616, 626 (S.D. Ind.1990); *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 990 (S.D. Ohio), *aff'd in part and modified in part sub nom. Williams v. Rhodes*, 393 U.S. 23 (1968); and in *Grogan v. Graves*, Civ. 90-2378-0 (U.S. Dist. Ct., D.Kan. 1990)(unreported opinion). *But see Batey v. Krivanek*, Civ. 78-815 (U.S. Dist. Ct., M.D. Fla. 1978)(unreported opinion); *see also Hall v. Simcox*, 766 F.2d 1171 (7th Cir.), *cert. denied*, 474 U.S. 1006 (1985).

will be elected; but this is just part of the meaning and significance of a vote. By giving or withholding their votes, citizens demonstrate in the most convincing way possible -- through the formal commitment of the ballot -- what persons, parties and policies they are prepared to support or reject. By the solemnity and formality of the ballot, voters express their preferences to each other, to those presently holding public office, to present and prospective candidates for office, and to the political parties which underwrite those candidacies. Voting is thus a complex act of political participation, consisting at once of expression, commitment and choice.

Hawaii is one of a very small minority of states that have allowed the state-prepared ballot -- which was introduced to facilitate the sovereign choice of voters -- to stifle that choice by foreclosing entirely the casting of write-in votes. By prohibiting write-in voting, Hawaii violates principles of political participation and expression which are the foundation of our constitutional democracy. Indeed, Hawaii's policy of compelling voters to choose only among those candidates listed on the ballot or not to vote at all offends three distinct -- although, in this case, interrelated -- constitutional principles.

First, when Hawaii denies petitioner the opportunity to cast a write-in vote for the person of his choice, in circumstances where none of the listed candidates are acceptable to him, it leaves him with a meaningless ballot. Without the opportunity to cast a write-in ballot, in these circumstances, petitioner's electoral franchise is effectively nullified. He cannot direct his "portion of sovereign power" to a candidate of his own choosing. And he is not even permitted to use his vote to express his dissent from the candidates offered on the state-prepared ballot. In these circumstances -- where none of the listed candidates are acceptable to him -- he is given no genuine opportunity to participate in the election.

Second, Hawaii's policy effectively imposes a form of

ideological adherence upon those who feel voting to be a civic responsibility but can find no acceptable candidate on the ballot. Hawaii gives voters the choice of either expressing support for candidates with whom and policies with which they disagree or not voting at all. It, thereby, conditions the right to vote upon the waiver of one's independent First Amendment right to remain free from being forced to express support for ideological positions or individuals with which one disagrees.

Third, Hawaii's policy violates First Amendment neutrality principles when it declares that the ballot may be used only to express support for the candidates listed on the ballot but not to convey the message: "None of the above." In essence, Hawaii discriminates against voters wishing to express dissent in this fashion and does so on the basis of the content of the voter's political message.

The court of appeals upheld Hawaii's policy only by adopting a narrow and ultimately erroneous conception of the fundamental right to vote. The court ignored the central meaning of the franchise as a critically important form of political participation and expression. It compounded this error by casually accepting the state's proffered justifications for the policy without ever seriously asking whether that policy is "necessary" to the advancement of any legitimate or compelling state interests. No such showing can be made here. Not one of the interests Hawaii puts forth justifies a total ban on write-in voting. Accordingly, Hawaii's total ban on write-in voting cannot survive the heightened constitutional scrutiny required.

In advancing this challenge, petitioner does not suggest that the state is obligated to permit a write-in candidate to serve in an office for which he or she is not qualified under state law. The constitutionality of any limitations on those seeking to hold public office must be judged on their own terms. Those terms are not an

issue in this lawsuit. Nor does petitioner challenge the manner in which candidates acquire positions on the state-prepared ballot. This is not a ballot access case. In this case Hawaii has imposed a blanket prohibition against all write-in voting. This blanket prohibition is the focus of petitioner Burdick's constitutional challenge.

ARGUMENT

I. HAWAII'S ABSOLUTE PROHIBITION AGAINST WRITE-IN VOTING SERIOUSLY BURDENS CONSTITUTIONAL RIGHTS OF ELECTORAL PARTICIPATION AND POLITICAL EXPRESSION

Write-in ballots did not become a matter of note or democratic consequence until late in the nineteenth century, when the system of state-prepared ballots, commonly described as the Australian Ballot system, was first introduced in this country.[8] The idea of a government-printed ballot was seen as a progressive reform designed to reduce a variety of fraudulent election practices. Its end was to make elections better express the actual, free choice of voters by increasing voter secrecy, reducing the corruption of party politics and protecting the integrity of the process. One hundred years later, instead of protecting voter choice, the state-prepared ballot in Hawaii has become an impediment to free choice.

Prior to the turn of the century, citizens were sover-

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[8] The Australian Ballot was first introduced in this country, in 1888, in connection with local elections held in Louisville, Kentucky. Later that same year, Massachusetts enacted a state-wide law mandating a state-prepared ballot. By the presidential election of 1892, "thirty-eight states had passed Australian Ballot laws in one form or another." L. E. Fredman, *The Australian Ballot: The Story of an American Reform* IX (1968).

eign over their voting preferences as a matter of course. They were free to prepare their own ballots, use pre-printed tickets offered by one of the political parties, or alter the political parties' tickets to suit their personal preferences. In effect, all ballots were write-in ballots.[9] The Wisconsin Supreme Court summarized these free-wheeling ballot practices:

> In the beginning the regulations were few and simple. Persons went to the voting places fixed by law and there delivered to officers whose duties were prescribed by statute a paper upon which they signified their choice of officers. The ballots might be written, printed, partly written, partly printed, and any sort of combination of persons who were candidates might be printed or written upon a ballot.

State ex. rel. Lafollette v. Kohler, 228 N.W. 895, 906 (Wis. 1930).

The broad adoption of the Australian Ballot near the turn of the century reduced the disorder of the earlier system and blunted some of the abuses that came with that disorder. But, it was quickly and widely recognized that the Australian Ballot, if untempered by the opportunity for voters to write-in the candidates of their choice, would impose a narrow regimentation on the right to vote which was at sharp odds with the exercise of personal sovereignty contemplated by democracy. State court after state court heard the complaints of voters frustrated in their choices at the voting booth, and the vast majority responded by finding a right to cast a write-in vote somewhere in state law.[10] State constitutions were occasionally the formal source of this right, and a simple but eloquent vision of free and equal political participation was often the explicit predicate of legal judgment in these cases.[11]

In upholding write-in voting, many of these courts spoke pointedly to the nature of the right to vote and to the disenfranchisement that would occur if citizens could not vote "according to their own free and unrestricted choice." *Barr v. Cardell*, 155 N.W. 312, 315 (Iowa 1915). For example, in upholding write-in voting the Supreme Court of Illinois observed:

> It is claimed that section 14 prohibits the voter from writing on the ballot the name of a person who has not been nominated . . . and that it is the intention of the act that no vote should be cast for a person who was not nominated . . . . [I]f the construction contended for by appellee be the correct one, the voter is deprived of the constitutional right of suffrage; he is deprived of the right of exercising his own choice; and when this right is taken away there is nothing left worthy of the name of the right of suffrage -- the boasted free ballot becomes a delu-

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[9] *See* Reynolds and McCormick, "Outlawing 'Treachery': Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910," 72 The Journal of American History 835, 844 (March, 1986).

[10] *But see* Batey, *supra* at 206 n.31.

[11] The Supreme Judicial Court of Massachusetts summarized this judicial development at the time.

> In general, it may be said that the so-called 'Australian Ballot Acts, in the various forms in which they have been enacted in many of the states of this country, have been sustained by the courts, provided the acts permit the voter to vote for such persons as he please, by leaving blank spaces on the official ballot, in which he may write, or insert in any other proper manner, the names of such persons, and by giving him the means, and a reasonable opportunity, to insert or write in such names.

Cole v. Tucker, 41 N.E. 681 (Mass. 1895). *See also Jackson v. Norris*, 195 A. 576, 585 (Md. 1937).

sion.

Sanner v. Patton, 40 N.E. 290, 292-93 (Ill. 1895).[12] Moreover, other state courts, during this period, assumed the right to cast a write-in ballot to be beyond dispute even as they addressed other election law issues. For example, the Supreme Court of Pennsylvania, in reviewing a challenge to the format of Philadelphia's printed ballot, accepted write-in voting as an inherent feature of a fair electoral process:

> Unless there was such provision to enable the voter not satisfied to vote any ticket on the ballot, or for any names appearing on it, to make up an entire ticket of his own choice, the election as to him would not be equal, for he would not be able to express his own individual will in his own way.

Oughton v. Black, 61 A. 346, 348 (Pa. 1905). The California Supreme Court, in resolving an election controversy over certain disputed ballots, similarly noted in passing:

> Under every form of ballot of which we have had any experience the voter has been allowed -- and it seems to be agreed that he must be allowed -- the privilege of casting his vote for any person for any office by writing his name in the proper place.

Patterson v. Hanley, 136 P. 821, 823 (Cal. 1902).

These opinions exemplified a broad recognition

[12] During the period shortly after the introduction of the Australian Ballot, numerous state courts upheld write-in voting either as matter of statutory interpretation or constitutional entitlement. *See, e.g., Barr v. Cardell*, 155 N.W. 312; *Snortum v. Homme*, 119 N.W. 59 (Minn. 1909); *Mayor of Jackson v. State*, 59 So. 873 (Miss. 1912); *Park v. Rives*, 119 P. 1034 (Utah 1911); *Littlejohn v. Desch*, 121 P. 159 (Colo. 1912).

among the state courts that some write-in ballot opportunity is essential to free and fair political participation among citizens who have widely divergent political values and goals. More recent state court decisions have confirmed these earlier judgments.[13] As the Supreme Court of Florida Court observed: "We believe the right of each elector [to vote] for a write-in candidate is as important now as it was in 1893." *Smith v. Smathers*, 372 So.2d 427, 429 (Fla. 1979).

This Court, while never considering directly the question of a federal constitutional right to a write-in ballot, has recognized the importance of the write-in ballot as a release from the constraints of ballot access requirements. *Storer v. Brown*, 415 U.S. 724, 736 n.7 (1974); *Jenness v. Fortson*, 403 U.S. 431, 438 (1971).[14] And, as noted above, the Court of Appeals for the Fourth Circuit has recently found a federal constitutional right to cast a write-in vote inherent in this Court's jurisprudence. *Dixon*, 878 F.2d 776.

What unites this widely shared and durable understanding of the political process -- and distinguishes it from the decision below by the Ninth Circuit -- is a recognition that voting involves far more than the static choice among candidates listed on a ballot. Elections are a dynamic part of political discourse and growth within a democratic community; they are "a rallying point for like-minded citizens." *Anderson*, 460 U.S. at 788.

Voters associate with each other and with candidates

[13] *See Canaan*, 710 P.2d at 282 n.22 (collecting cases). *But see* Batey, *supra* at 206 n.31.

[14] *But see Anderson v. Celebrezze*, 460 U.S. 780, 799 n.26 (1983) (recognizing that the availability of write-in voting is not sufficient to overcome otherwise unconstitutional ballot access laws); *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974)(same).

"for the common advancement of political beliefs and ideas [in] a form of 'orderly group activity' protected by the First and Fourteenth Amendments [citations omitted]." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). And, indeed, this Court has noted that this form of political association and expression is deserving of constitutional protection even if it is not likely to result in a successful electoral outcome. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 185-86 (1979). Participation in the process is as important as directly affecting the result because "an election campaign is a means of disseminating ideas as well as attaining political office." *Id.* at 186.

In this regard, this Court has also held that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989). But, political speech does not end with the campaign. It continues right into the voting booth when the voter expresses what he or she has come to believe in the course of that campaign. Thus, the casting of one's ballot -- which is, itself, the very act of democratic decisionmaking -- deserves no less constitutional protection than campaign speech. Even more than other forms of political expression, voting is the one expressive act that occurs "at the crucial juncture at which the appeal to common principles may be translated into concerted action and hence to political power in the community." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986).

Beyond serving as a medium for political expression, voting is also an act of civic commitment that flows from and is tethered to our concept of representative democracy. It is an axiom of our constitutional faith that representative democracy rests upon the "consent of the governed." And this "consent" is, in turn, obtained through an election process in which each citizen has the

right to participate and, in so doing, to exercise "his [or her] own individual will in his [or her] own way." *Oughton*, 61 A. at 348. So understood, voting constitutes a personal act of political participation that -- more than any other undertaking by a citizen -- signifies one's status as a member of the political community. When the state imposes conditions on the vote that make it impossible for citizens to participate meaningfully at the polls, it denies them their full citizenship and undermines the consent upon which government itself must rely.

Hawaii's policy of prohibiting all write-in votes seriously burdens both the participatory and expressive aspects of voting. It does so in three ways that are of constitutional import. First, it debases petitioner's right to vote. Hawaii's policy left petitioner, in the circumstances that gave rise to this suit, without a meaningful ballot and, in so doing, denied him the right to participate fully and effectively in the electoral process. Through its blanket prohibition of write-in voting, Hawaii continues to impose this form of disenfranchisement. Second, Hawaii's challenged policy conditions petitioner's right of electoral participation upon the waiver of his First Amendment right to remain free from espousing ideological positions that he does not support. Third, it discriminates against petitioner based upon the content of the message that he seeks to convey at the ballot box.

A. Hawaii Denies Petitioner The Opportunity To Cast A Meaningful Ballot

This Court has often recognized that disenfranchisement can occur when one is forced to execute an ineffective ballot just as it can occur when one is entirely denied the right to vote. This point was made, most forcefully, in *Reynolds*, 377 U.S. at 555:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right

> strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

In *Reynolds* and in the "one person, one vote" cases that followed, this Court was, of course, concerned with the numerical debasement of the franchise. But the concern with electoral arrangements that dilute a citizen's political voice and that render less effective the voter's right of electoral participation goes well beyond issues of numerical equality.[15]

This sense was captured by Justice White who, writing for the Court in *Morris*, 489 U.S. at 693, looked back at this Court's "one person, one vote" cases and observed:

> These cases are based on the propositions that in this country the people govern themselves through their elected representatives and that "each and every citizen has an inalienable right to full and effective participation in the political processes" of the legislative bodies of the Nation, State or locality as the case may be. *Reynolds v. Sims*, 377 U.S. at 565. Since "[m]ost citizens can achieve this participation only as qualified voters through the election of legislators to represent them," full and effective participation requires "that each citizen have an equally effective voice in the election of members of his . . . legislature." *Ibid.* As Daniel Webster once said, "the right to choose a representative is every man's portion of sovereign power." *Luther v. Borden*, 7 How 1, 30, 12 L.Ed. 581 (1849)(statement of counsel).

Hawaii's total prohibition against write-in voting has denied petitioner "full and effective participation in the political processes" and continues to do so. For example, upon entering the polling booth during the 1986 election, Burdick was given a ballot listing only one candidate for the State House of Representatives in his legislative district. He found that candidate unacceptable but was denied the opportunity to cast a write-in ballot. In that circumstance, he simply could not participate in the State House of Representatives election held in his district. The ballot he received was utterly meaningless to him. A similar debasement of his franchise occurs whenever petitioner confronts a ballot listing only a candidate or candidates that he cannot support and he is given no opportunity to express his own views through the ballot.

In these circumstances, petitioner is undoubtedly denied his right to "full and effective participation" in the electoral process as well as his right to an "equally effective voice" in the election just as surely as the voters whose rights were unconstitutionally abridged in *Reynolds* or in *Morris*. So understood, debasement of the franchise can be as severe -- perhaps even more so -- when a voter is given an ineffective ballot at the polling booth as when the voter is disadvantaged by a malapportioned districting arrangement. Malapportioned districts leave some voters with unequal influence over the legislative process. But, the voter in an underrepresented district still has the opportunity to express his or her

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[15] For just this reason, the Court has held justiciable challenges to reapportionment schemes that provide quantitative equality, but result in a qualitative dilution of the vote. *See Davis v. Bandemer*, 478 U.S. 109 (1986). Moreover, this Court has also insisted that government administer the franchise as the vehicle for the people's voice, and not as a mechanism for the entrenchment of interests, parties or particular points of view. *See Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

political point of view by casting a ballot. By contrast, when a voter is presented a meaningless ballot, such voter is left with no opportunity, at all, to express himself or herself at the polls.

To be sure, states may limit the number of candidates appearing on the ballot in order to ensure that elections are conducted fairly and honestly and with a minimum of confusion for the voters. *Storer*, 415 U.S. at 732. But, petitioner does not insist that the State of Hawaii place the name of his preferred candidate on the state's official ballot. This is not a ballot access case. Petitioner asks only that he be permitted to participate in the political process by expressing his personal opposition to the candidates listed on the ballot and to vote, instead, for an alternative preference.

By denying petitioner that alternative, the State of Hawaii seriously burdens his constitutional right to vote. It is no answer to the disenfranchisement thus effected to suggest, as the Ninth Circuit did below, that petitioner has "ample alternative channels" to express his dissent from the candidates listed on the ballot and that he can always articulate his opposition to these candidates in some other forum. Presumably, under the Ninth Circuit's view, petitioner could always pass out leaflets to express his opposition to the candidates listed on the ballot. But, contrary to the reasoning of the Ninth Circuit, voting for a candidate and leafletting in support of that candidate are not equivalent constitutional acts. In both instances, the substantive message may be the same. And yet, for the reasons suggested above, street-corner leafletting is no substitute for voting.

The exercise of the franchise involves a very special form of political expression that necessarily involves the act of electoral participation.[16] In failing to provide the

[16] This special quality has been described as "a voice backed by a (continued...)

option of write-in voting, Hawaii denies petitioner that right to participate meaningfully in the essential civic event of representative democracy -- the election of those who make the laws under which we all must live.

B. Hawaii Conditions Petitioner's Right Of Electoral Participation Upon The Waiver Of His Right To Remain Free From Espousing Ideological Positions That He Does Not Support

Of course, petitioner could have participated in the 1986 state legislative election in question here,[17] if he had been prepared to vote for a candidate that he found unacceptable. But in this circumstance, petitioner's right of electoral participation would have been conditioned upon his waiver of his First Amendment right not to espouse ideological positions with which he disagreed.

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court held that the First Amendment right of individuals to maintain their own political views and opinions barred the state from compelling school children to participate in a flag salute ceremony. Justice Jackson, writing for the Court, noted:

> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed and the Bill of

[16] (...continued)
vote." Michelman, "Conceptions of Democracy: The Case of Voting Rights," 41 Fla. Law Rev. 443, 451 (1989).

[17] In 1986, as in preceding and subsequent elections, petitioner did participate to the degree that he voted for those candidates appearing on the ballot that he could support. But, since every electoral contest must be treated as a distinct election, petitioner could not participate in the 1986 state legislative race where, as noted above, the only candidate running was an individual for whom Burdick could not vote.

> Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

Id. at 641.

The First Amendment prohibition against compelled expression was subsequently extended in *Wooley v. Maynard*, 430 U.S. 705 (1977). The *Wooley* case involved a statute that prohibited motorists from obscuring or defacing the state motto as it appeared on New Hampshire automobile license plates. Motorists who objected to the motto on religious and conscientious grounds wanted to cover the motto on the license plate of their car and requested equitable relief to permit them to do so. Finding in favor of the motorists, this Court reasserted "the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking. . . ." *Id.* at 714.

Of course, the motorists in *Wooley* could have avoided the compelled expression mandated by state law if they had simply refrained from owning or driving a car. Nevertheless, the *Wooley* Court recognized that conditioning the ownership of an automobile -- one of the necessities of modern life -- upon the waiver of one's First Amendment right to be free from compelled ideological expression was itself an impermissible condition. The *Wooley* Court concluded that New Hampshire could not constitutionally "force[] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715.

The principles of *Wooley v. Maynard* apply with at least equal force to the present controversy. In *Wooley*, New Hampshire provided the motorists with a choice of espousing a message with which they disagreed or not driving a car. In this case, Hawaii provides petitioner

with the choice of expressing support for candidates with whom he disagrees or not voting in certain electoral contests. Accordingly, in this case, Hawaii is conditioning one constitutional right -- the right not to espouse views with which one disagrees -- upon the waiver on another constitutional right -- the right to vote.

This Court, however, has previously recognized that a state may not require its citizens "to forfeit one constitutionally protected right as the price for exercising another." *Lefkowitz v. Cunningham*, 431 U.S. 801, 808-09 (1977). *See also Dunn v. Blumstein*, 405 U.S. 330 (1972) (state cannot force a choice between constitutional right to vote and constitutional right to travel); *Simmons v. United States*, 390 U.S. 377 (1968)(Fourth Amendment right cannot be conditioned on waiver of Fifth Amendment rights).

If as in *Cunningham* it is unconstitutional to condition the right of political association on the waiver of one's Fifth Amendment rights; and if, as in *Dunn*, it is unconstitutional to condition the right to travel on the waiver of one's right to vote; it must surely be unconstitutional to condition one's right to vote -- as Hawaii does here -- on the waiver of one's First Amendment right not to express support for a candidate with whom one disagrees.

C. Hawaii Discriminates Against Petitioner Based Upon The Content Of The Message That He Seeks To Convey

Our system of free expression is built upon the proposition that, as a general matter, government must remain neutral with respect to the expressive activities of its citizens. This Court has repeatedly insisted that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

Police Department v. Mosley, 408 U.S. 92, 95 (1972).

The First Amendment's prohibition against government favoring certain speakers because of the content of their speech extends to a prohibition against the state favoring or disfavoring certain citizens because of their political affiliation or favoring others because of the popularity or social utility of their ideas. Thus, in *NAACP v. Button*, 371 U.S. 415, 444-45 (1963), the Court observed:

> [T]he Constitution protects expression and association without regard to the race, creed or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity or social utility of the ideas and beliefs which are offered.

And, in *Southeastern Promotions v. Conrad*, 420 U.S. 546, 572 n.2 (1975), Chief Justice Rehnquist, although dissenting on other grounds, observed that "[a] municipal auditorium which opened itself up to Republicans while closing itself to Democrats would run afoul of the Fourteenth Amendment."

In *Mosley*, 408 U.S. at 96, the Court summarized these doctrinal principles:

> [U]nder the Equal Protection clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.[18]

While this neutrality principle is most frequently invoked where the state has either created a public forum or where a government agency is supervising First Amendment access to a public facility, the doctrine has not been limited to those circumstances. Thus, this Court has applied the First Amendment neutrality principle to invalidate state laws that imposed disparate financial burdens on publications based upon the content of those publications. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987). And earlier this term, the Court invalidated New York's "Son of Sam" law on the grounds that it imposed a special financial burden on certain authors based upon the content of their writings. *Simon & Schuster v. New York State Crime Victims Board*, ___ U.S. ___, 60 U.S.L.W. 4029 (Dec. 10, 1991).

To understand the scope of the neutrality principle in any particular setting or with respect to any particular activity often requires attention to the history of government regulation of that setting or activity. *See Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 44-45 (1983). In this regard, neutrality acquires special significance when government regulates the ballot. The history of the vote in this country demonstrates that the voting booth is an important medium for the direct expression of individual views. Regulation of the ballot

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[18] As the preceding discussion from the *Mosley* opinion suggests, there may be some disagreement as to whether the neutrality principle derives its doctrinal source from the First Amendment or the Equal Protection Clause. *See, e.g.*, Justice Frankfurter's opinion in *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter concurring). But, whatever its source, the neutrality principle is firmly established within our constitutional jurisprudence.

came late and even when it came it was accompanied, in most jurisdictions, by the safety-valve of write-in voting.[19] The polling booth was traditionally and appropriately seen as a kind of government sponsored forum in which every voter had an unrestrained, and, therefore, equal right to express his electoral preferences.

This historical tradition is explained by and, in turn, reinforces a common impulse and understanding that the voting booth represents the principal medium through which the entire citizenry of a community engages in a vital form of political expression. It follows that any attempt by the state to stifle the electoral message of any duly qualified voter -- and to do so on the basis of the content of that message -- implicates the neutrality principle and requires that the state come forward with very good reasons for doing so. "The First Amendment presumptively places this sort of [content-based] discrimination beyond the power of the Government." *Simon & Schuster*, 60 U.S.L.W. at 4032.

There are good reasons for Hawaii to regulate the electoral process so as to ensure that elections are conducted fairly and honestly and with a minimum of confusion for the voter. *Storer*, 415 U.S. at 732. To that end, it was entirely appropriate for states to assume -- as they did at the close of the Nineteenth Century -- the responsibility of preparing the ballot for the convenience of the voters and to avoid election fraud. And because a printed ballot can only list a finite number of candidates, it is well understood that, in preparing the ballot, states must develop fair and reasonable rules to decide which candidates should appear on the ballot and which candidates should be excluded. But, in developing these rules, the First Amendment neutrality principle dictates that the state cannot regulate access to the state-prepared ballot in a way that favors certain political parties or ideologies

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[19] *See* pp.16-17 *supra*.

over others. *Williams v. Rhodes*, 393 U.S. at 32. Thus, the neutrality principle applies even when the state prepares its official ballot.

The neutrality principle applies here, as well. By banning all write-in votes, Hawaii has exceeded its role as a neutral referee and has, in effect, told voters that they can express support for any of the candidates listed on the ballot but they cannot submit a ballot to convey the message: "none of the above." In this case, Hawaii confronts the voter who believes that radical change outside the conventional candidates and parties is required and who wants to convey that message by voting "no." Hawaii tells this voter that this message cannot be conveyed at the ballot box. Hawaii discriminates against such a dissident[20] on the basis of the content of his or her message. In so doing, Hawaii transgresses First Amendment neutrality principles.

It is no response to this argument to suggest that this critic can always express his or her dissent by not voting. If petitioner is denied the opportunity to express his views through the ballot and if he chooses, as a consequence, not to vote in that electoral contest, he will be

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[20] But, one need not be a political extremist in order to feel compelled to express dissent at the polls. A mainstream voter may well experience a situation where none of the candidates listed on the ballot is acceptable. Such a voter may have even previously supported a candidate listed on the ballot, at the primary election, only to discover during the political campaign leading up to the general election that he or she can no longer support that candidate. During the course of the campaign the voter might discover that the candidate's positions have changed; or that the voter's original understanding of the candidate's positions was wrong; or that new developments render the candidate unacceptable to the voter. In such circumstances, the voter may be unable to vote for the candidate that he or she initially supported and may also remain at ideological odds with the other candidate or candidates. When this occurs, the voter must retain the option of casting a write-in ballot against all the listed candidates. The voter must retain the option of registering a dissent.

perceived as an apathetic citizen -- not a dissident. There is a world of difference -- a constitutionally significant difference -- between not voting and voting "none of the above." Only the second activity permits petitioner to register formally his message of dissent. In discussing the constitutional prohibition against government censoring the content of a citizen's message, the Court in *Simon & Schuster*, 60 U.S.L.W. at 4032, observed:

> The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Individual dignity and choice are no less at issue in the polling booth.

It is also no answer to this concern to urge, as the Ninth Circuit did below, that Hawaii law provides candidates with easy access to the ballot. For even if, *arguendo*, Hawaii's ballot access laws were quite liberal,[21] it is

[21] In fact, Hawaii is not a state where candidates or minor parties can easily gain access to the general election ballot and thereby present a serious challenge to the political *status quo*. For, even if an independent candidate were to gain access to the primary ballot it will be quite difficult for such a candidate to move from the primary to the general election ballot. The reason for this is that when a citizen of Hawaii enters the polling site on primary day, that citizen must choose to vote in either the Democratic, Republican or Libertarian primary election or, in the alternative, may choose to vote on a nonpartisan ballot consisting of the names of independent candidates. Haw. Rev. Stat. §12-31. (Op.Cert.App. 45a-46a). Not surprisingly, very few voters choose the nonpartisan ballot. Nevertheless, Hawaii law requires that, to secure a place on the general election ballot, an independent candidate (continued...)

inevitable that at some point the state would be required to limit the number of candidates appearing on the ballot. And any such limitation would undoubtedly leave some voters, at some time, without a candidate that they can support. Thus, Hawaii could not escape the issues raised by this case even if it were extraordinarily liberal in granting candidates access to the ballot.

Properly understood, therefore, this is not a case about Hawaii's ballot access laws.[22] This is a case about the voter's personal and fundamental right to say "no" to all of the candidates listed on the ballot and to express an alternative preference. Accordingly, this case requires the State of Hawaii to explain why, contrary to the practice and tradition in most other states, it is necessary to deny Hawaii's voters this basic right.

In *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51

[21] (...continued)
must obtain either 10% of the votes cast for that office in the primary election or as many votes as the partisan victor with the fewest votes. Haw. Rev. Stat. §12-41. This requirement serves as a serious impediment to the general election ballot. Thus, contrary to the suggestion of the Ninth Circuit, it is quite difficult for an independent candidate to gain access to the general election ballot in Hawaii.

It is similarly difficult for a minor party to gain access to the general election ballot. While the Ninth Circuit correctly noted that Hawaii requires petitions signed by only 1% of the total registered state voters for a new party to gain access to the ballot, the court of appeals ignored the fact that Hawaii also requires that these petitions be filed 150 days (5 months) prior to the primary election. Haw. Rev. Stat. §11-62. (Op.Cert.App. 64a-65a). This extraordinarily early filing deadline, again, makes Hawaii a state where access to the general election ballot is not easy.

[22] Hawaii could, perhaps, require persons seeking election as write-in candidates to register prior to the election in order to be eligible to hold office, so long as the registration requirements were reasonable. *See* Voters' Speech Rights, note 5 *supra*, at 662 n.45. Hawaii, however, has not chosen to enact a registration requirement. Instead, Hawaii totally prohibits write-in voting. It is that total prohibition which is the subject of this constitutional challenge.

(1957), this Court noted:

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association . . . . History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Hawaii's effort to still such voices in the medium where such speech matters most -- at the ballot box -- is inconsistent with First Amendment neutrality principles and Hawaii must come forward with very powerful reasons to justify its policy.

II. THE NINTH CIRCUIT MISAPPLIED THE STANDARDS OF JUDICIAL SCRUTINY URGED BY THIS COURT IN *ANDERSON v. CELEBREZZE*

In *Anderson v. Celebrezze*, 460 U.S. 780, this Court articulated a broad and flexible analysis for dealing with cases involving the constitutional right of electoral participation.[23] As summarized in *Anderson*, a court called upon to review a statute or policy restricting electoral participation,

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789.

Nothing in this flexible analytic approach suggests that the *Anderson* Court intended to abandon more than two decades of doctrinal development that preceded it. During that time, this Court had repeatedly subjected to heightened judicial scrutiny laws that selectively distributed the fundamental right to vote, *e.g.*, *Carrington v. Rash*, 380 U.S. 89 (1965); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Dunn v. Blumstein*, 405 U.S. 330, or laws that substantially burdened rights of political expression and association. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976). Where state laws could not survive

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[23] Prior to *Anderson*, this Court had applied a variety of seemingly different analytic standards in reviewing statutes and policies that burdened rights of electoral participation. *Compare, e.g., Dunn v. Blumstein*, 405 U.S. at 342, with *Bullock v. Carter*, 405 U.S. 134, 144 (1972), *with Clements v. Fashing*, 457 U.S. 957, 964 (1982), and *with Mandel v. Bradley*, 432 U.S. 173, 178 (1977).

The *Anderson* Court expressed dissatisfaction with "litmus-paper" (continued...)

[23] (...continued)
tests. 480 U.S. at 789. *See also* Justice Stevens' concurring opinion in *Eu*, 489 U.S. at 233, and Justice Blackmun's concurring opinion in *Illinois Board of Elections*, 440 U.S. at 183-85 (1979). Accordingly, in *Anderson*, the Court articulated a flexible analysis that attempted to reconcile the disparate standards it had previously employed.

such scrutiny, they were found unconstitutional.

The *Anderson* analysis continues to allow for the application of heightened judicial scrutiny in appropriate cases. Indeed, the initial inquiry contemplated by *Anderson* into the "character and magnitude of the asserted [constitutional] injury" is designed to determine the appropriate standard for the particular case. Where a law is found to burden rights of political participation in a direct or substantial manner, it must satisfy an "exacting" or "heightened" level of judicial scrutiny. A court called upon to review such a law must demand a genuinely close fit between that law and the interests the law purports to advance. It must demand that the statute -- or, in this case, the policy in question -- is "narrowly tailored" in the pursuit of "compelling governmental interests." This point was made clear in recent post-*Anderson* cases such as *Tashjian*, 479 U.S. 208 and *Eu*, 489 U.S. 214 and, most recently, in *Norman v. Reed*, ___ U.S. ___, 60 U.S.L.W. 4075 (Jan. 14, 1992).

In *Tashjian*, this Court reviewed the constitutionality of a Connecticut statute that permitted only party members to vote in the primary elections held by the major political parties. The Republican Party of Connecticut challenged this statutory restriction claiming that the statute unconstitutionally abridged the party's rights of political association. In entertaining this challenge, the Court initially applied the *Anderson v. Celebrezze* standard. Upon finding that the statute burdened "the party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action," *Tashjian*, 479 U.S. at 216, the Court applied heightened scrutiny in rejecting the state's claim that its statute was "a narrowly tailored regulation which advance[d] the state's compelling interests . . . ." *Id.* at 217.

Similarly, in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, this Court reviewed the

constitutionality of a California law that prohibited the governing bodies of political parties from endorsing specific candidates in primary contests. In evaluating this statute, the Court again looked first to the *Anderson* standard and asked "whether the statute burden[ed] rights protected by the First and Fourteenth Amendments." *Id.* at 222. The *Eu* Court went on to observe that,

> [i]f the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest [citing *Tashjian* and other cases] and is narrowly tailored to serve that interest. [citations omitted]

Id. Finding that the statute could not satisfy this standard of judicial review, the Court held the California restriction unconstitutional.

In *Norman v. Reed*, 60 U.S.L.W. 4075, this Court reviewed the constitutionality of a statutory scheme in Illinois that had been interpreted by the Illinois Supreme Court to prevent a new political party from running a slate of candidates in Cook County. In holding that the new party had been unconstitutionally excluded from the ballot, this Court again looked to the standard articulated in *Anderson* and observed that the First and Fourteenth Amendments[24] protect "the constitutional interest

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[24] The early constitutional right to vote cases such as *Reynolds*, *Carrington*, *Kramer* and *Dunn* looked principally to the Equal Protection Clause of the Fourteenth Amendment as the textual source for the emerging doctrine. Subsequent cases recognized the important expressive and associational aspects of electoral participation and began looking to the First Amendment as a textual source of constitutional protection in this area. *See, e.g., Williams v. Rhodes*, 393 U.S. at 34 (Justice Douglas, concurring), and at 41 (Justice Harlan concurring); *Anderson*, 460 U.S. at 786 n.7. In *Norman*, this Court explicitly (continued...)

of like-minded voters to gather in pursuit of common political ends thus enlarging the opportunities of all voters to express their own political preferences." 60 U.S.L.W. at 4077. The Court went on to address the burden placed on a state that chooses to curtail this constitutional interest. Writing for the Court, Justice Souter observed:

> To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation [citation omitted] and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.

Id.

The broad approach of *Anderson* and the more specific standards of *Tashjian*, *Eu* and *Norman* are equally applicable here. As discussed above, the Hawaii policy at issue seriously burdens the expressive and participatory aspects of the constitutional right to vote.[25] The "character and magnitude" of these constitutional injuries are sufficient to require that Hawaii demonstrate that its absolute prohibition of write-in voting can survive heightened judicial scrutiny. The state must demonstrate that its policy is narrowly drawn to advance interests of compelling importance. That showing cannot be made.

[24] (...continued)
grounded its decision in the First Amendment (as incorporated by the Fourteenth Amendment) and did not "engage in a separate Equal Protection Clause analysis." *Norman v. Reed*, 60 U.S.L.W. at 4077 n.8. At the same time, the *Norman* Court recognized the continuing validity of its earlier equal protection decisions. *Id.*

[25] In *Wooley*, this Court subjected New Hampshire's attempt to compel ideological adherence among its motorists to the requirements of heightened judicial scrutiny. 430 U.S. at 716. In *Simon & Schuster*, this Court subjected New York's violation of "neutrality" principles and its content-based discrimination of expression to the requirements of heightened scrutiny. 60 U.S.L.W. at 4032. A similar standard of review is applicable here.

III. HAWAII'S POLICY CANNOT SURVIVE SERIOUS CONSTITUTIONAL SCRUTINY

Hawaii argues that its write-in ban promotes "political stability" in two ways: by preventing "inter-party raiding;" and by preventing "sore loser" candidacies. In neither instance, however, is Hawaii able to show that a total prohibition against write-in voting is "necessary" to address these concerns.

This is the case with respect to "inter-party raiding" for two reasons. First, "inter-party raiding" is a concern that is limited to primary elections.[26] "Raiding" is never an issue in general elections. Therefore, Hawaii's total prohibition against write-in voting in general elections as well as in primary elections cannot be justified out of a concern for "inter-party raiding." Second, Hawaii has made clear that it does not regard "raiding" as a serious problem by permitting "open" primaries.[27] Where, as here, the state permits any voter to vote in any party's primary election it cannot then turn around and seriously

[26] "Inter-party raiding" is "the organized switching of blocks of votes from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson*, 460 U.S. at 788, n.9. This Court noted in *Anderson* that the phenomenon of "inter-party raiding" is "applicable only to party primaries." *Id.* at 801, n.29.

[27] In Hawaii's open primary, all registered voters may choose in which party to vote. Haw. Rev. Stat. §12-31. (Op.Cert.App. 45a-46a). For a description of the different types of "open" and "closed" primaries, *see Tashjian*, 479 U.S. at 222, n.11 (1986).

claim that a restriction on write-in voting is "necessary" to prevent "raiding."

Similarly, Hawaii's total prohibition against write-in ballots cannot be justified upon the claim that such a restriction is necessary to prevent candidates who lose primary elections -- so called "sore loser" candidates -- from subsequently attaining office as write-in candidates. This interest can be achieved with more "narrowly tailored" legislation. Hawaii's attempt to reach "sore losers" by barring all write-in voting even in elections that do not involve "sore losers" is simply too unfocused. It reaches far more broadly than is necessary to satisfy whatever interest the state has in preventing "sore losers" from attaining public office. *Cf. Storer*, 415 U.S. at 735.

The claim that Hawaii's prohibition is necessary to ensure an informed electorate is also unpersuasive. Again, it is unlikely in the extreme that a voter will go to the trouble to execute a write-in ballot for a candidate that he or she knows little or nothing about. Seen in these terms, this justification for Hawaii's prohibition against write-in voting is "highly paternalistic," just as this Court regarded California's ban on primary endorsements by political parties to be paternalistic when the state argued that such a prohibition was necessary to permit voters to make wise decisions unencumbered by the views of political parties. *Eu*, 489 U.S. at 223, 228.

Finally, Hawaii's interest in protecting the "internal structure of its election laws" -- by protecting primary victors who are running unopposed from being required to mount a campaign and to run in the general election -- cannot serve as a basis for Hawaii's total prohibition against write-in ballots. Again, Hawaii's total ban on write-in voting reaches far too broadly. It is not confined to those instances where a candidate emerges out of the primary process and is entitled by statute or constitutional provision to run unopposed.[28] A broad and blanket prohibition against all write-in voting that extends well beyond the specific situations where unopposed candidates emerge from the primary process cannot be justified here.[29]

Moreover, if, under Hawaii law, primary victors emerge from the primary process unopposed and succeed to office without running in the general election, Hawaii has effectively converted the primary election into the only electoral contest for the public office, in question. In this circumstance, it is all the more important to permit citizens to submit write-in ballots in these dispositive primary elections.

For all of these reasons, the Ninth Circuit seriously misapplied the *Anderson* analysis when it upheld Hawaii's prohibition against write-in voting upon a casual acceptance of the state's proffered justifications for its restriction. Hawaii's total prohibition against write-in voting is neither "necessary" nor "narrowly tailored" to

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[28] Hawaii law permits an unopposed primary victor to be automatically designated an office-holder without being required to run in the general election only in connection with state legislative contests (Hawaii Const. art. III, §4) and with elections to county office (Haw. Rev. Stat. §12-41). Section 12-42 (Op.Cert.App. 47a) of the Hawaii Revised Statutes also permits the automatic designation of primary victors in connection with special elections.

Thus, with the exception of special elections, this mechanism only applies in elections to the state legislature and in elections for county office. It does not apply at all to federal elections, gubernatorial elections or elections to the Board of Education. (*See* Respondent's Brief in Opposition at 24 n.14).

[29] Petitioner maintains serious reservations with respect to the legitimacy of the practice of automatically designating an unopposed primary victor as an officeholder without requiring that candidate to run in the general election. That practice is not challenged directly in this case. Its legitimacy is, however, implicated to the degree that Hawaii invokes this practice as justification for its ban on write-in voting.

the advancement of any of its proffered justifications. The proper application of constitutional analysis -- as it has been articulated by this Court most recently in *Tashjian*, *Eu*, and *Norman* -- supports entirely the claim that Hawaii's total prohibition against all write-in voting cannot and should not be sustained.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

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Dated: January 23, 1992